UEM Land Sdn Bhd v Menteri Kewangan Malaysia

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW WA-25–185–05 OF 2021
AMARJEET SINGH J
27 MARCH 2023

Administrative Law — Judicial review — Application for leave to commence judicial review proceedings — Applicant submitted request to Minister of Finance ('Minister') to give Director General of Income Tax directions and/or to exempt notices of assessments — Non-response by Minister treated as rejection of request — Whether applicant entitled to reliefs — Whether there was 'refusal to make a decision' susceptible to certiorari — Whether Minister had power to do what was requested — Income Tax Act 1967 ss 127(3A) & 135

The applicant entered into an agreement with the Johor State Government whereby the applicant must: (a) sell lots to Bumiputera purchasers with a discount on the sale price offered to the general public; and (b) offer to the public a certain percentage of the total properties contained within each development as low-cost medium-cost units. The applicant requested from the Johor State Executive Council for the the waiver and exemption of the Bumiputra quota and low-cost requirement for properties to be constructed in the developments. The Johor State Executive Council agreed to the request made by the applicant in return for payments made to the Johor State Government. The Director-General of Inland Revenue ('DGIR') requested the applicant to furnish documentation for the purpose of assessing the payment of tax made in the years 2013 to 2018. Upon the documents being furnished, the DGIR informed the applicant that its claim for deduction for the release of Bumiputera quota and low-cost construction was disallowed as it did not fall under s 33(1) of the Income Tax Act 1967 ('ITA'). The applicant proffered an explanation with supporting documents contradicting the DGIR's position. The DGIR disagreed with the applicant and issued notices for years of assessment 2013, 2014 and 2015 in the amounts of RM970,801.20, RM4,184,682.80 and RM3,331,448.40 ('the assessments'), respectively. The applicant submitted a request to the Minister of Finance ('Minister') to give the DGIR directions under s 135 of the ITA and/or to exempt the notices that were raised pursuant to the assessments under s 127(3A) of the ITA. The Minister did not respond to the applicant's request and the applicant averred that the Minister's failure to respond was treated as a rejection of the applicant's request. Hence, this application for leave to commence judicial review, where the applicant sought the reliefs: (i) an order for the Minister to exercise his powers under ss 135 and/or 127(3A) of the ITA to set aside or exempt the notice of assessment made by the DGIR on the

ground that the assessments were illegal, void, unlawful and/or in excess of authority, irrational and/or unreasonable and resulted in breach of the applicant's legitimate expectation ('the first principal relief'); and (ii) a declaration that the contribution amount for the release of the Bumiputera quota and low-cost construction was deductible under s 33(1) of the ITA ('the second principal relief'). A B

Held, dismissing the application:

(1) The opening words of the first principal relief were 'an order for the Minister to exercise his powers'. The powers referred to were housed in ss 135 and 127(3A) of the ITA. The use of such words was to compel the Minister to exercise the said powers and, in the manner, dictated by the applicant. The said order was therefore in substance an order in the nature of mandamus. It was certainly not an order for certiorari. The order as framed was an order in the nature of mandamus which could not in law be granted on the face of what had been pleaded by the applicant. As such there was no arguable case for the first principal order to be investigated at the substantive stage. The reason the order could not be granted was because the mandamus did not lie to perform a discretionary power and only lied where the applicant had a legal right to compel the performance of a duty provided in the statute. The use of the word 'may' in both sections conferred discretionary power and not a duty on the Minister (see paras 15–16). C D E

(2) There was no nexus between the grounds raised and the relief of certiorari, given the fact that the Minister as decision-maker did not make a decision. The grounds the applicant raised sought to quash a fictitious decision. Further, there was no inordinate delay as the Minister was only given 14 days to respond and the judicial review application was filed two days after the deadline imposed by the applicant had passed. This time frame did not evince a clear determination on part of the Minister not to comply with the request. Thus, there was no clear evidence of a refusal to make a decision on part of the Minister. To take the date when the application for leave was heard was fallacious in view of the fact that the Minister was already served with the instant application for leave. In the circumstances, there was no decision to qualify as a 'refusal to make a decision' which was susceptible to certiorari (see paras 27 & 30). F G H

(3) The Minister had no power to do what the applicant was requesting him to do under ss 135 and/or 127(3A) of the ITA. There could be no arguable case given that s 135 of the ITA did not envisage the Minister giving directions to the DGIR to set aside the assessment (which under the provisions of the ITA was expressly within the jurisdiction of the Special Commissioners or the High Court) and that s 127(3A) of the ITA I

did not envisage granting exemptions in respect of illegal and/or unlawful tax. Since there was no power to do what was requested of the Minister, the second principal relief ie the declaration that the gains arising from the applicants' disposal of shares fall within the scope of real property gains tax and not income tax had no basis to be granted against the Minister (see paras 35 & 41).

[Bahasa Malaysia summary

Pemohon telah menandatangani perjanjian dengan Kerajaan Negeri Johor di mana pemohon hendaklah: (a) menjual lot kepada pembeli Bumiputera dengan diskaun ke atas harga jualan yang ditawarkan kepada orang ramai; dan (b) menawarkan kepada orang ramai peratusan tertentu daripada jumlah hartanah yang terkandung dalam setiap pembangunan sebagai unit kos sederhana kos rendah. Pemohon memohon daripada Majlis Mesyuarat Kerajaan Negeri Johor untuk penepian dan pengecualian kuota Bumiputera dan keperluan kos rendah bagi hartanah yang akan dibina dalam pembangunan tersebut. Majlis Mesyuarat Kerajaan Negeri Johor bersetuju dengan permintaan yang dibuat oleh pemohon sebagai balasan kepada bayaran yang dibuat kepada Kerajaan Negeri Johor. Ketua Pengarah Hasil Dalam Negeri ('KPHDN') meminta pemohon untuk memberikan pendokumenan bagi tujuan menilai pembayaran cukai yang dibuat dalam tahun 2013 hingga 2018. Setelah dokumen diberikan, KPHDN memaklumkan pemohon bahawa tuntutannya untuk potongan bagi pelepasan kuota Bumiputera dan pembinaan kos rendah tidak dibenarkan kerana ia tidak termasuk di bawah s 33(1) Akta Cukai Pendapatan 1967 ('ACP'). Pemohon telah mengemukakan penjelasan dengan dokumen sokongan yang bercanggah dengan pendirian KPHDN. KPHDN tidak bersetuju dengan pemohon dan mengeluarkan notis bagi tahun taksiran 2013, 2014 dan 2015 masing-masing berjumlah RM970,801.20, RM4,184,682.80 dan RM3,331,448.40 ('taksiran'). Pemohon mengemukakan permintaan kepada Menteri Kewangan ('Menteri') untuk memberikan arahan kepada KPHDN di bawah s 135 ACP dan/atau untuk mengecualikan notis yang dibangkitkan menurut taksiran di bawah s 127(3A) ACP. Menteri tidak menjawab permintaan pemohon dan pemohon menganggap bahawa kegagalan Menteri untuk menjawab dianggap sebagai penolakan permintaan pemohon. Oleh itu, permohonan kebenaran ini untuk memulakan semakan kehakiman, di mana pemohon memohon relif: (i) perintah supaya Menteri menjalankan kuasanya di bawah ss 135 dan/atau 127(3A) ACP untuk mengetepikan atau mengecualikan notis taksiran yang dibuat oleh KPHDN atas alasan bahawa taksiran itu tidak sah, terbatal, menyalahi undang-undang dan/atau melebihi kuasa, tidak rasional dan/atau tidak munasabah dan mengakibatkan pelanggaran jangkaan sah pemohon ('relif prinsipal pertama'); dan (ii) pengisytiharan bahawa jumlah caruman bagi pelepasan kuota Bumiputera dan pembinaan kos rendah boleh ditolak di bawah s 33(1) ACP ('relif prinsipal kedua').

Diputuskan, menolak permohonan:

(1) Kata-kata pembukaan relif prinsipal pertama ialah 'perintah untuk Menteri menjalankan kuasanya'. Kuasa yang dirujuk ditempatkan dalam ss 135 dan 127(3A) ACP. Penggunaan perkataan sedemikian adalah untuk memaksa Menteri menjalankan kuasa tersebut dan, mengikut cara yang ditentukan oleh pemohon. Oleh itu, perintah tersebut pada dasarnya adalah perintah dalam sifat mandamus. Ia sememangnya bukan satu perintah untuk certiorari. Perintah seperti yang dirangka adalah perintah yang bersifat mandamus yang tidak boleh diberikan di sisi undang-undang atas apa yang telah diplid oleh pemohon. Oleh itu, tiada kes yang boleh dipertikaikan untuk perintah prinsipal pertama disiasat pada peringkat substantif. Alasan perintah itu tidak boleh diberikan adalah kerana mandamus tidak terletak untuk melaksanakan kuasa budi bicara dan hanya terletak di mana pemohon mempunyai hak undang-undang untuk memaksa melaksanakan tugas yang diperuntukkan dalam statut. Penggunaan perkataan 'boleh' dalam kedua-dua seksyen memberikan kuasa budi bicara dan bukan kewajipan kepada Menteri (lihat perenggan 15–16).

(2) Tiada pertalian antara alasan yang dibangkitkan dan relif certiorari, memandangkan fakta bahawa Menteri sebagai pembuat keputusan tidak membuat keputusan. Alasan yang dibangkitkan pemohon bertujuan untuk membatalkan keputusan rekaan. Tambahan pula, tiada kelewatan yang melampau kerana Menteri hanya diberi tempoh 14 hari untuk menjawab dan permohonan semakan kehakiman difailkan dua hari selepas tarikh akhir yang ditetapkan oleh pemohon telah berlalu. Jangka masa ini tidak menunjukkan penentuan yang jelas di pihak Menteri untuk tidak mematuhi permintaan itu. Oleh itu, tidak ada keterangan jelas tentang keengganan untuk membuat keputusan di pihak Menteri. Untuk mengambil tarikh permohonan kebenaran didengar adalah salah memandangkan Menteri telah pun menerima permohonan kebenaran ini. Dalam keadaan itu, tidak ada keputusan untuk layak sebagai 'enggan membuat keputusan' yang terbuka kepada certiorari (lihat perenggan 27 & 30).

(3) Menteri tidak mempunyai kuasa untuk melakukan apa yang diminta oleh pemohon di bawah ss 135 dan/atau 127(3A) ACP. Tidak ada kes yang boleh dipertikaikan memandangkan s 135 ACP tidak menjangkakan Menteri memberi arahan kepada KPHDN untuk mengetepikan taksiran (yang di bawah peruntukan ACP secara jelas adalah dalam bidang kuasa Pesuruhjaya Khas atau Mahkamah Tinggi) dan s 127(3A) ACP tidak menjangkakan memberikan pengecualian berkenaan dengan cukai yang menyalahi undang-undang dan/atau haram. Memandangkan tiada kuasa untuk melakukan apa yang diminta daripada Menteri, relif prinsipal kedua iaitu pengisytiharan bahawa

keuntungan yang timbul daripada pelupusan saham pemohon termasuk dalam skop cukai keuntungan hartanah dan bukan cukai pendapatan tidak mempunyai asas untuk diberikan terhadap Menteri (lihat perenggan 35 & 41).]

Cases referred to

Bukit Sembawang Rubber Co Ltd & Sembawang Estates Ltd, Re [1961] 1 MLJ 269 (refd)

Karpal Singh Ram Singh v Ketua Hakim Negara [2011] 4 CLJ 179, HC (refd)

Ketua Pengarah Hasil Dalam Negeri v Perbadanan Kemajuan Ekonomi Negeri Johor [2009] 4 MLJ 682; [2009] 5 CLJ 518, CA (refd)

Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713; [1994] 3 CLJ 540, SC (refd)

Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor [2014] 3 MLJ 145; [2014] 2 CLJ 525, FC (folld)

Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim [2011] 6 MLJ 490, FC (refd)

Menteri Besar Negeri Pahang Darul Makmur v Seruan Gemilang Makmur Sdn Bhd [2010] 4 MLJ 36; [2010] 5 CLJ 123, CA (refd)

Mohd Karim bin Abas & Ors v Ketua Pengarah Jabatan Hal Ehwal Kesatuan Sekerja [2013] 4 MLJ 420; [2013] 1 LNS 280, CA (refd)

National Land Finance Co-operative Society Ltd v Director General of Inland Revenue [1994] 1 MLJ 99; [1993] 4 CLJ 339, SC (refd)

Peguam Negara v CMMT Investment Limited (Civil Appeal No W-01 (IM)-575–10 of 2021) (unreported), HC (refd)

Prima Nova Harta Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (Appeal No WA-14–7–12 of 2019) (unreported), HC (refd)

R v Central Professional Committee For Opticians; Ex parte Brown [1949] 2 All ER 519, KBD (refd)

R v Secretary of State for the Home Department, ex p Rukshanda Begum [1990] COD 107, CA (refd)

Sovereign Teamwork (M) Sdn Bhd lwn Ketua Pengarah Hasil Dalam Negeri [2022] 8 MLJ 215, HC (refd)

Tan Sri Musa bin Hj Aman & Ors v Tun Datuk Seri Hj Panglima Hj Juhar Hj Mahiruddin & Ors [2021] 3 MLJ 329; [2021] 3 CLJ 87, CA (refd)

Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2006] 5 MLJ 60; [2006] 1 CLJ 927, CA (refd)

Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v Yang Maha Mulia Pemangku Raja Kelantan & Ors [2011] 1 MLJ 128, HC (refd)

Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd [1995] 2 MLJ 442; [1995] 3 CLJ 627, SC (refd)

United Allied Empire Sdn Bhd v Pengarah Tanah dan Galian Selangor & Ors [2018] 1 MLJ 661, CA (refd)

WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296; [2012] 4 CLJ 478, FC (folld)
Winsome Al-Yatama Sdn Bhd v Pentadbir Tanah Kota Tinggi [2015] MLJU 711; [2015] 9 CLJ 110, HC (refd)
Workon Sdn Bhd v The Director of Lands & Surveys, Sabah [1999] 4 MLJ 177, HC (refd)
Zainal bin Haji Nasiruddin v The Registrar of Societies [2012] MLJU 1623, HC (folld)

Legislation referred to

Courts of Judicature Act 1964 Schedule, para 1
Federal Constitution art 96
Income Tax Act 1967 ss 33(1), 99, 127(3A), 135, Part VI, Chapter 2, Part X, Chapter 1, Schedule 5, paras 26, 34
Judges' Code of Ethics 2009 s 13
Land Acquisition Act 1960 s 4(1), Form A
Rules of Court 2012 O 53
Societies Act 1966

S Saravana Kumar (with Dharshini Sharma) (Rosli Dahlan Saravana Partnership) for the applicant.
Nik Isfahanie Tasnim bt Wan Ab Rahman (Federal Counsel, Attorney General's Chambers) for the respondent.

Amarjeet Singh J:

INTRODUCTION

[1] On 13 March 2023, I dismissed the application for leave to commence judicial review proceeding by the applicant, UEM Land Sdn Bhd against the Minister of Finance ('the Minister') for the following principal reliefs (stated in encl 1):

(a) *an order for the Minister to exercise his powers* under s 135 and/or s 127(3A) of the Income Tax Act 1967 ('ITA') to set aside or exempt the notice of assessment made by the Director-General of Inland Revenue ('DGIR') for the years of assessment ('YA') 2014 and notices of additional assessment for the YA 2013 and 2015 all dated dated 30 April 2021 ('the assessment') on the ground that the assessments were illegal, void, unlawful and/or in excess of authority, irrational, and/or unreasonable and resulted in breach of the applicant's legitimate expectation ('first principal relief);

(b) *declaration* that the contribution amount for the release of the Bumiputra quota and low-cost construction ('the contribution') is deductible under s 33(1) of the ITA ('second principal relief).

[2] I now state the reasons for my decision.

THE BACKGROUND FACTS

[3] The following salient facts averred in the affidavit verifying facts give context to the filing of the instant application for leave. The applicant is a company incorporated in Malaysia principally engaged in the business of property development, property investment, project procurement and management and strategic holding. On 10 April 2014, the applicant entered into an agreement with the Johor State Government whereby the applicant must sell to lots to Bumiputera purchasers with a discount on the sale price offered to the general public. The applicant was also to offer to the public a certain percentage of the total properties contained within each development as low-cost medium-cost units.

[4] As means to encourage direct foreign investments through the sale of residential, commercial, recreational educational and industrial properties, the applicant requested from the Johor State for the waiver and exemption of the Bumiputra quota and low-cost requirement for properties to be constructed in the developments. The Johor State Executive Council agreed to the request made by the applicant in return for payments made to the Johor State Government. Prior to the execution of the agreement both the applicant and the Johor State Government signified their intention to enter into a formal agreement by an exchange of letters of undertaking dated 1 June 2021 and 20 June 2012 respectively.

[5] By way of letter dated 18 September 2020, the DGIR requested the applicant to furnish documentation for the purpose of assessing the payment of tax made in the year 2013 to 2018. Upon the documents being furnished, the DGIR by way of a letter dated 7 April 2021 informed the applicant that the applicant's claim for deduction for the release of Bumiputra quota and low-cost construction is disallowed as it does not fall under s 33(1) of the ITA. On 28 April 2021 the applicant profferred an explanation with supporting documents contradicting the DGIR's position. The DGIR disagreed with the applicant and issued notices of assessment as follows: (i) YA 2013 an amount of RM970,801.20; (ii) YA 2014 an amount of RM4,184,682,80; and (iii) YA 2015 an amount of RM3,331,448.40 ('the assessments').

[6] On 6 May 2021, the applicant submitted a request to the Minister to give the DGIR directions under s 135 of the ITA and/or to exempt that were raised pursuant to the assessments under s 127(3A) of the ITA. The Minister did not respond to the applicant's request. The applicant averred (para 11 of the affidavit in support of the leave application) that the Minister's failure to respond is treated as a rejection of the applicant's request under s 135 of the ITA

and/or s 127(3A) of the ITA. A

[7] On 19 May 2021, the applicant filed this application for leave to commence judicial review for the reliefs stated above.

GROUNDS FOR JUDICIAL REVIEW B

[8] The grounds in support for the reliefs sought in the application were stated in the O 53 statement as follows:

(a) the decision of the Minister was illegal, void, unlawful and/or in excess of authority on account of the Minister failing to take the following matters into account: C

(i) that the DGIR had acted arbitrarily and exceeded his authority when he failed to consider that s 33(1) of the ITA explicitly provides that any expenses incurred wholly and exclusively in the production of the taxpayer's income is deductible; D

(ii) that the DGIR had failed to take into account the decisions of this court in *Prima Nova Harta Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (Appeal No WA-14–7–12 of 2019) (unreported) and *Sovereign Teamwork (M) Sdn Bhd lwn Ketua Pengarah Hasil Dalam Negeri* [2022] 8 MLJ 215 where it was held that the cash contribution to obtain the release of the Bumiputera lots quota is a deductible expense under s 33(1) of the ITA as it is expense wholly and exclusively incurred in the production of the taxpayer's income; E F

(iii) that the DGIR disregarded the trite principle that one can only look at the language used and what is clearly said and nothing is to be read in or implied (see *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99; [1993] 4 CLJ 339); and G

(iv) that the DGIR disregarded the trite principle that a provision in a taxing statute must be read strictly is one that is to be applied against the revenue and not in its favour. If there is any doubt, it must be resolved in the taxpayer's favour. H

(b) the Minister failed to ask the questions which he ought to have asked, ie whether the said assessments have any legal and constitutional authority and in the alternative or additionally, whether the Minister may disregard the decisions of the courts if it was illegal, void, unlawful and/or in excess of authority on account of the Minister failing to take the following matters into account; I

(c) had the Minister asked the relevant questions and considered the relevant matters outlined above, he would have exercised his authority reasonably and fairly, and thus, would have taken steps to set aside the assessments given that it was issued arbitrarily and therefore illegally;

(d) the decision of the Minister is tained with irrationality for the following reasons:

(i) no reasonable Minister similarly circumstanced would have come to the same decision especially when no justification or basis for his decision not to exempt the arbitrarily raised taxes;

(ii) the Minister had exercised his authority arbitrarily and/or mechanically without applying his mind to the facts and circumstances advanced in para 8(a) above.

(iii) the Minister had failed to take cognisance of binding superior court decisions on the interpretation and construction of tax legislation; and

(iv) the Minister failed to appreciate the true effectand give effect to the provisions of the ITA which amounted to a contravention of art 96 of the Federal Constitution.

(e) the Minister failed in his duty to give reasons for his decision and it is open for this court to conclude that the Minister had no good reason to give for the decision; and

(f) there was a denial of the applicant's legitimate expectation when the Minister failed to take cognisance of binding superior court decisions on the interpretation and construction of tax legislation.

The test to be applied at leave stage

[9] This brings me to the duty of the judge hearing an application for leave. The law is trite. A person who is adversely affected by a 'decision', 'action', or omission', by a public authority is entitled to apply for judicial review to review its legality through any of the reliefs specified in para 1 of the Schedule to the Courts of Judicature Act 1964. However, leave of court must be obtained before an application for judicial review can be filed. To obtain leave, the applicant has a threshold to clear. It is settled law that the threshold is very low and the test for such threshold is stated in *Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim* [2011] 6 MLJ 490 and the often-quoted case of *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] 4 CLJ 478). The test is described in *WRP Asia Pacific Sdn Bhd* in the following words:

> Without the need to go into depth of the abundant authorities, suffice if we state that leave may be granted if the leave application is not thought of asfrivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must attached to the application though ie, unless thematter for judicial review is amenable to judicial review absolutely no success may be envisaged.

[10] Thus, leave will be refused if the application is frivolous or vexatious (eg no good reason for the delay in making the application, or if the application is brought against a person immunised from such proceedings). If the application is not frivolous or vexatious, the next question is to ascertain whether the applicant has shown an arguable case to obtain the relief sought at the substantive stage. An arguable case according to *R v Secretary of State for the Home Department, ex p Rukshanda Begum* [1990] COD 107 and adopted by the Supreme Court in *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442; [1995] 3 CLJ 627 is one where there is:

> ... a point for further investigation on a full inter partes basis with all such evidence as is necessary on thefacts and all such argument as is necessary on thelaw.

[11] Leave will be refused if no success is envisaged at the substantive hearing. In carrying out the exercise of ascertaining whether there is or is not an arguable case the judge is merely to peruse the material made available by the applicant and is not permitted to go into the merits in any depth. In cases where the Attorney General appears at the leave stage, or where the putative respondent is allowed to appear at the leave stage, the judge is required to adhere to the following constraint stated in *Rukshanda Begum* when considering the representations as to why leave should not be granted (per Gopal Sri Ram JCA (as His Lordship then was) in *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60; [2006] 1 CLJ 927):

> The inter partes leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing. The test to be applied by the judge at that inter partes leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator's award, ... namely: if, taking account of a brief argument on either side, the judge is satisfied at there is a case fit for further consideration, then he should grant leave.

[12] One other important aspect at leave stage concern matters that are not amenable to judicial review. As stated in *WRP Asia Pacific Sdn Bhd* leave will not be granted if the subject matter for review is not amenable to judicial review. Only if the matter raised is found amenable to judicial review does the question of clearing the low threshold ie an arguable case arises. In this regard matters not amenable to judicial review are of the kind that are non-justiciable eg matters insulated by the Federal Constitution, written law or common law

from judicial determination such as proceedings in Parliament, or personal discretion of the Rulers (see *Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v Yang Maha Mulia Pemangku Raja Kelantan & Ors* [2011] 1 MLJ 128 and *Tan Sri Musa bin Hj Aman & Ors v Tun Datuk Seri Hj Panglima Hj Juhar Hj Mahiruddin & Ors* [2021] 3 MLJ 329; [2021] 3 CLJ 87).

Applying the test

[13] There were several objections raised by the Attorney General against the granting of leave. After considering the arguments of both sides I am of the view that the applicants have failed to clear the low threshold test for leave to be granted for the reasons stated below. But, before I proceed it is important to keep in mind the following crucial facts.

[14] The Minister did not make a decision as requested by the applicant in the letter not replied to and it is the applicant who treated the non-reply as a decision by the Minister rejecting the request to exercise the power under s 135 and/or s 127(3A) of the ITA, and that the applicant prayed for two principal reliefs: the first principal relief begins with the words, 'an order for the Minister to exercise his powers under ss 135 and/or 127(3A) of the ITA' and the second principal relief is for a declaration that the contribution is deductable under s 33(1) of the ITA.

The applicants are patently not entitled to the first principal relief

[15] The opening words of the first principal relief are: 'an order for the Minister to exercise his powers'. The powers referred to are housed in ss 135 and 127(3A) of the ITA. The use of such words is to compel the Minister to exercise the said powers and, in the manner, dictated by the applicant. The said order is therefore in substance an order in the nature of mandamus. It is certainly not an order for certiorari. It is trite that an order of certiorari is to quash the legal effect of a decision and this is not made out by the words employed in the relief sought. I have considered the submissions and agree with Federal Counsel that the order as framed is an order in the nature of mandamus which cannot in law be granted on the face of what had been pleaded by the applicant. As such there is no arguable case for the first principal order to be investigated at the substantive stage.

[16] The reason the order cannot be granted is because mandamus does not lie to perform a discretionary power and only lies where the applicant has a legal right to compel the performance of a duty provided in the statute. The use of the word 'may' in both the sections confer discretionary power and not a duty on the Minister. For ease of reference the sections are reproduced below. Section 135 of the ITA states:

> The Minister *may* give to the Director General directions of a general character (not inconsistent with this Act) as to the exercise of the functions of the Director General under this Act; and the Director General shall give effect to any directions so given.

While s 127(3A) of the ITA states:

> The Minister *may,* in any particular case exempt any person from all or any of the provision of this Act, either generally or in respect of any income of a particular kind or any class of income of a particular kind.

[17] There is a plethora of authorities on the point and it is sufficient to cite the following instructive extract from MP Jain, *Administrative Law of Malaysia and Singapore* (4th Ed) at 615 (see Court of Appeal decisions of *Menteri Besar Negeri Pahang Darul Makmur v Seruan Gemilang Makmur Sdn Bhd* [2010] 4 MLJ 36; [2010] 5 CLJ 123 and *Mohd Karim bin Abas & Ors v Ketua Pengarah Jabatan Hal Ehwal Kesatuan Sekerja* [2013] 4 MLJ 420; [2013] 1 LNS 280 where the same extracts from earlier edition of the book were applied):

> *Mandamus* is thus a very wide remedy which is available against a public officer to see that a duty is performed or carried out, in accordance with law. Enforceable by *mandamus* is a duty of a public nature, the performance of which imperative and not optional or discretionary. *Thus, if an officer has power, rather than a duty, and does not use such power, mandamus is not issued if the officer refuses to exercise the power for the wrong reasons.*

[18] The decision in *Karpal Singh Ram Singh v Ketua Hakim Negara* [2011] 4 CLJ 179 is a relevant and persuasive authority. There, an order of *mandamus* was sought directing the Chief Justice to respond to the applicant's request under s 13 of the Judges' Code of Ethics 2009 to act in the manner dictated by the applicant. It was held that there must be under the law some duty cast upon the public officer before an order of mandamus can be made. If the public officer does not carry out his duty, the court will call upon him to perform that duty by an order of mandamus. The court found that s 13, from the language used, did not impose a duty on the Chief Justice to act in a manner dictated by the applicant. The principle was lucidly stated as follows:

> What can be enforced through mandamus is a duty of a public nature, the performance of which is imperative and not optional or discretionary with the concerned authority. Thus, if an officer has power, rather than a duty, and if he does not use his power, *mandamus* is not issued to compel him to exercise his power

Certiorari to impugn 'decision' on letter not replied to

[19] The applicant in its supplementary written submission dated 22 December 2022 and during oral clarification in court submitted that the order sought against the Minister was an order of certiorari and not mandamus. This submission is not correct and is against the clear wordings of the first principal relief sought in the application. As shown above, the applicant had

sought an order that was in the nature of mandamus on the complaint that the Minister did not reply to the applicant's letter dated 29 October 2021, It was for this reason that the order was sought to compel the Minister to exercise his powers under ss 135 and/or 127(3A) of the ITA either to give directions to the DGIR to set aside the assessments or to exempt the tax levied vide the assessments,

[20] Notwithstanding, that cediorari was not prayed as a relief, I considered the written and oral submission made by counsel including the O 53 statement and affidavit verifying facts to determine whether certiorari was in fact the remedy sought by the applicant. The argument was articulated in the supplementary written submission as follows:

> 5. In the present matter, this application is made in consequent to the Respondent's omission, failure and/or refusal to respond to the applicant's letter dated 6.5.2021. It is the Applicant's contention that the *Respondent's conduct tantamount to a refusal to exercise its discretion* under Sections 135 and/or 127(3A) of the ITA to make a decision in response to the letter issued by the Applicant. It is not denied by the Attorney General Chambers ('AGC') that to date, no response nor reasoning were provided for the refusal to exercise their discretion by the Respondent pertaining to the said letter.
>
> 6. The omission, failure and/or refusal of the Respondent *to exercise its discretion* under Sections 135 and/or 127(3A) of the ITA is an *unlawful act ('the Decision')* which the applicant had sought to challenge before this Honourable Court in the present application. *Henceforth, the Applicant is seeking an order of certiorari to* quash the Decision of the Respondent on the grounds of inter alia illegality, irrationality and procedural impropriety.
>
> 7. The Applicant submits that the word 'decision' has a wide meaning. Reference is made to the Federal Court's judgment in the case of *Members of the Commission of Enquiry* ... whereby the Federal Court accepts that even a refusal to make a decision amounts to a decision.
>
> 9. It is also the Applicant's humble submission that a delay on the part of the Respondent in making a decision would, on its own, amount to a refusal to make a decision. It is undisputed that to date, the Applicant has not received a decision on their appeal letter issued to the Respondent.

[21] In essence, the applicant is treating the non-reply to its letter by the Minister as a 'refusal to make a decision' which is one of the two types of 'decision' susceptible to an order of certiorari according the decision of the Federal Court in the *Members of the Commission of Enquiry* case. It was said there that decisions susceptible to an order of certiorari are one of two types: type one where the decision-maker has made a decision and type two where the decision-maker has refused to make a decision in the following paragraph of the judgment:

> It is trite law that the purpose of an order for certiorari is to quash the legal effect of

a decision. In England, in the case of *Council of Civil Service Unions v Minister for Civil Service* [1984] 3 All ER 935 the House of Lords held that *for a decision to be susceptible to the court's reviewing powers, there must first be a decision by a decision maker or a refusal by him to make a decision,* and, that decision must affect the aggrieved party by either altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy.

[22] The applicant further submitted that there is a delay on part of the Minister to make a decision and to date the applicant has not received a decision on their appeal to the Minister (para 9 of the applicant's supplementary submissions). The applicant then referred to the decision of *Zainal bin Haji Nasiruddin v The Registrar of Societies* [2012] MLJU 1623 and *Workon Sdn Bhd v The Director of Lands & Surveys, Sabah* [1999] 4 MLJ 177 in support of the submission.

[23] Upon considering the submissions, I found that there was no inordinate delay on part of the Minister and therefore there was no decision by the Minister not to make a decision. In the absence of such decision there would be no 'decision' that is susceptible to certiorari. This in turn would result in no arguable case for further investigation at the substantive stage. In coming to this conclusion, I had to first decide whether I could consider the relief of certiorari when the relief was not expressly pleaded and then decide whether there was a 'refusal to make a decision' that was susceptible to the remedy of certiorari.

[24] In deciding the first question, I kept in mind the established principle that a judge hearing an application for leave under O 53 of the Rules of Court 2012 has to adopt a flexible approach when determining technical objections (see *Tang Kwor Ham* and *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145; [2014] 2 CLJ 525). Adopting this approach, I found that grounds had been pleaded in the O 53 statement (paras 3(a) to 3(d)) seeking to quash a purported decision of the Minister on illegality, irrationality and procedural impropriety indicating that the relief of certiorari was in contemplation notwithstanding that the relief was not prayed for.

[25] The grounds to quash the purported decision of the Minister have already been alluded to in para 8 above. Since there are grounds raised for such remedy, I am of the view that the applicant is entitled to contend that the application has established an arguable case for the relief of certiorari. And if the applicant is able to establish an arguable case, this court can make an order that necessary amendments be made to the cause papers to reflect the correct relief sought.

[26] Now, the grounds stated in the O 53 statement alleged that the Minister had purportedly made a decision (as opposed to a refusal to make a decision) on the request of the applicant. It is alleged that the purported decision is riddled with errors and which decision is liable to be quashed on grounds of illegality, irrationality and procedural impropriety. Herein lies the fatal flaw in the applicant's case.

[27] The incontrovertible fact shows that the Minister did not make any decision and did not reply to the applicant's letter. There is therefore no nexus between the grounds raised in the O 53 statement and the relief of certiorari, given the fact that the Minister as decision-maker did not make a decision. The gounds the applicant raised in the O 53 statement seeks to quash a fictitious decision. As such, no arguable case for investigation at the substantive stage is made out and one which is fair to say is also frivolous and vexatious.

[28] The second question was whether there was a decision by the Minister refusing to make a decision (as opposed to making a decision). The decision by a decision-maker refusing to make a decision is susceptible to an order of *certiorari* (decision in the second sense accepted in the *Members of the Commission of Enquiry case*). In the instant case the Minister did not reply to the Applicant's letter where it was sought for the Minister to exercise his powers under ss 135 or 127(3A) of the ITA in the manner dictated by the applicant. To recall, the Applicant is also making a case that there is a decision by the Minister refusing to make a decision by virtue of inordinate delay,

[29] The principles in respect of a 'refusal to make a decision' were established in *Re Bukit Sembawang Rubber Co Ltd & Sembawang Estates Ltd* [1961] 1 MLJ 269 and followed in *Winsome Al-Yatama Sdn Bhd v Pentadbir Tanah Kota Tinggi* [2015] MLJU 711; [2015] 9 CLJ 110. The principles can be summarised as follows:

(a) a refusal to make a decision may be an absolute refusal in terms or there may be conduct amounting to a refusal. Where the respondent has not refused compliance in express terms it is a question of fact whether his conduct evinces a clear determination not to comply; and

(b) there must be clear evidence of a refusal to act. This can be established primarily on the basis of an inordinate long delay as to amount to a refusal to consider and determine the application made to the decision-maker (*R v Central Professional Committee For Opticians; Ex parte Brown* [1949] 2 All ER 519).

[30] In my judgment, based on the facts alluded to by the applicant, there was no inordinate delay as the Minister was only given 14 days to respond and the judicial review application was filed two days after the deadline imposed by

the applicant had passed. This time frame does not evince a clear determination on part of the Minister not to comply with the request. Thus, there is no clear evidence of a refusal to make a decision on part of the Minister. To take the date when the application for leave was heard is fallacious in view of the fact that the Minister was already served with the instant application for leave. In the circumstances, there was no decision to qualify as a 'refusal to make a decision' which is susceptible to certiorari.

[31] For completeness, even if there is a decision that qualifies as a 'refusal to make a decision' that is susceptible to certiorari what can be quashed, if at all, is merely the decision refusing to make a decision. The case of *Zainal bin Haji Nasiruddin* cited by the applicant is instructive. There the applicant made an application to the Registrar of Societies ('Registrar') to register a political party. The Registrar did not make any decision either to refuse or to allow the application. It was held that an inordinate delay, without good reason, to make a decision amounted to a 'refusal' to make a decision'. Ravinthran J (as His Lordship then was) held that such inordinate delay was unlawful and ultra vires the Societies Act 1966 but to compel the Registrar to register the political party would be putting the cart before the horse as the Registrar has not made any decision as yet. Thus, an order of mandamus to compel the Registrar to make a decision whether to register the political party or not to register the political party within 21 days of the order was made.

[32] Thus, an application to quash a decision by a decisionmaker not to make a decision must be accompanied by an order of mandamus to compel the decision-maker to make a decision on the matter. Without the accompanying order of mandamus the applicant is only left with 'no decision' made by the decisiorvmaker. Similarly, in the instant case, if the decision not to make a decision ie decision not to exercise powers under ss 135 and/or 127(3A) of the ITA, is quashed an order of *mandamus* to compel the Minister to exercise his powers must follow. However, as shown above no order of *mandamus* can be made as ss 135 and 127(3A) of the ITA confers discretionary power and not a duty on the Minister. Therefore, the appropriate remedy is the pending appeals before the Special Commissioners to set aside the said assessments.

[33] One final matter to be addressed is the submission that the applicant was entitled to seek certiorari based on the decision of *United Allied Empire Sdn Bhd v Pengarah Tanah dan Galian Selangor & Ors* [2018] 1 MLJ 661. That case is easily distinguished as it is a case decided to finality with the acquisition of the applicant's land unlike the instant case where no decision was made. In *United Allied Empire Sdn Bhd* there was a failure to issue Form A ie a mandatory requirement before land can be acquired under of s 4(1) of the Land Acquisition Act 1960 ('the LAA'). The non-compliance was part of the mandatory acquisition process under the LAA. The Court of Appeal found

that the failure to issue Form A was an omission to comply with a mandatory legal dictate thereby amounting to an illegality. An order of *certiorari* was issued to quash the said acquisition of the land. That case concerns an omission to comply with a mandatory requirement where a decision made while in the instant case no decision was ever made.

The non-applicability of ss 135 and 127(3A) of the ITA

[34] Here again it is important to keep in mind the following crucial facts: (i) that the Minister did not make a decision in respect of the applicants' requests; and (ii) that the assessments made by the DGIR are illegal and/or unlawful ie the tax cannot be levied in law. The applicant came to Minister to set aside the assessments made by the DGIR by way of directions to be given to the DGIR to set aside the same or the Minister himself exempt the tax as assessed by the DGIR.

[35] In my view, the Minister has no power to do what the applicant is requesting him to do under ss 135 and/or 127(3A) of the ITA. As such, there is no arguable case for investigation at the substantive stage for the reliefs prayed or not prayed for ie mandamus, certiorari and declaration on the material presented to this court. My reasons are as follows.

[36] The ITA is structurally designed and is divided into parts and chapters to take care of specific areas. The power to set aside any wrongful assessment in law lies with the Special Commissioners by way of an appeal under s 99 of the ITA. Sections 99–102 is in Chapter 2 under Part VI of the ITA which specifically provide for 'assessments and appeals'. The appeals envisaged in the sections are expressly directed against assessments made by the DGIR. The Special Commissioners are conferred with express power under para 26 of Schedule 5 of the ITA to discharge or set aside or amend any assessments made by the DGIR. An appeal against the decision of the Special Commissioners lie to the High Court (s 102 read with para 34 of Schedule 5 of the ITA).

[37] Section 135 of the ITA is housed in Chapter 1 under Part X which solely concerns 'administration'. The purpose of the provision is for the Minister, when he is of the view it is required, to give directions of a general character as to the exercise of the functions of the DGIR, not inconsistent with provisions of the ITA, to the DGIR.The directions are administrative and general in nature and certainly not directions specific in nature such as giving directions to the DGIR to set aside assessments he had made. Setting aside assessments is not a matter concerning 'administration' falling within the purview of s 135 of the ITA. The power to set aside assessments are provided only by way of appeal to the Special Commissioners for otherwise the assessment becomes final and enforceable.

[38] Section 127(3A) of the ITA specifically confers power on the Minister to grant tax exemptions. The section is in Part IX of the ITA which concerns 'exemptions, remission and other relief. Section 127(3A) of the ITA is an empowering provision conferring power on the Minister to exempt a person from (any provision' of the ITA or exempt 'any income of a particular kind or any class of income of a particular kind'. The section envisages that the person requesting exemption is lawfully liable to pay tax. But, in the instant case, what was sought to be exempted was tax that should not have been levied since it is the applicant's pleaded case that tax was illegally and/or wrongfully assessed in law.

[39] Now, it is basic law that 'income tax is a tax on income' and 'exemption only becomes relevant when there is chargeable income, but not otherwise'. This principle was reiterated in *Ketua Pengarah Hasil Dalam Negeri v Perbadanan Kemajuan Ekonomi Negeri Johor* [2009] 4 MLJ 682; [2009] 5 CLJ 518 by the Court of Appeal referring to, amongst others, *Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713; [1994] 3 CLJ 540 where it was held that a tax exemption is only given after liability to tax has been determined. In other words, there must be a first liability to income tax and then only the question of claiming exemption of the tax assessed could arise.

[40] In the instant case, the applicant is claiming to be exempted, not from lawfully determined tax but from illegally and/or unlawfully levied tax. That is not the purpose of s 127(3A) of the ITA. Unlawfully levied tax is the jurisdiction of the Special Commissioners. As such, s 127(3A) of the ITA is only applicable where there is a liability to pay lawfully assessed tax. Therefore, the exemption sought in the instant case is something that the Minister has no power of doing.

[41] For the above reasons there can be no arguable case given that s 135 of the ITA does not envisage the Minister giving directions to the DGIR to set aside the assessments (which under the provisions of the ITA is expressly within the jurisdiction of the Special Commissioners or the High Court) and that s 127(3A) of the ITA does not envisage granting exemptions in respect of illegal and/or unlawful tax. Since, there is no power to do what is requested of the Minister, the second principal relief ie the declaration that the gains arising from the applicants' disposal of shares fall within the scope of real property gains tax and not income tax has no basis to be granted against the Minister. In the circumstances, there is no arguable case for further investigation at the substantive stage.

A CONCLUSION

[42] One last matter. It was submitted that exactly the same applications for leave had been allowed by the High Court and in one of those cases ie *Peguam Negara v CMMT Investment Limited* (Civil Appeal No W-01 (IM)-575–10 of 2021) (unreported) the decision of the High Court was upheld. It suffices to say that the said cases are distinguishable on the admitted fact that the specific issue that arose for consideration in this case was not the subject matter of any of those cases,

[43] For the foregoing reasons the application for leave was dismissed.

Application dismissed.

Reported by Nabilah Syahida Abdullah Salleh